IN THE

Supreme Court of the United States

OCTOBER TERM 1938

No. 554

H. C. RORICK, JOSEPH R. GRUNDY and J. R. EASTON,

Appellants,

v.

BOARD OF COMMISSIONERS of Everglades Drainage District, etc., *et al.*,

Appellees.

APPEAL FROM DECREE OF SPECIALLY CONSTITUTED THREE JUDGE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS.

I. Equity has jurisdiction of this suit, since the plaintiff bondholders as beneficiaries of the trust created by the appropriation of the taxes for the payment of the bonds seek, among other things, to restrain the custodian of the taxes from executing the state statute by diverting these trust funds to other purposes, and seek to enjoin the Board of Commissioners and the Trustees from participating in such diversion.

The Board contends (Brief, pp. 10, 13) that this is not properly a suit in equity as there is an adequate remedy at law.

In the bill and each of the supplemental bills an injunction is sought against the State Treasurer as the custodian of the acreage taxes to prevent, through his execution of the subsequent statutes, the diversion of the taxes to purposes other than the payment of the bonds. The taxes are trust property in the hands of the custodian through the appropriation of the taxes in his hands for the payment of the bonds, the custodian is the trustee of the funds and the bondholders are the beneficiaries, as is clearly settled by the authorities cited by appellants at page 54 of their brief.

It is fundamental that equity has jurisdiction of trusts and that a beneficiary may enjoin the trustee from the diversion of the trust property to an improper purpose. *Clews* v. *Jamieson*, 182 U. S. 461; *Vickrey* v. *Sioux City*, 104 Fed. 64; *Olmstead* v. *Superior*, 155 Fed. 172; *Thompson* v. *Emmett Irrig. Dist.*, 227 Fed. 560 (C. C. A. 9); *Hidalgo County Road Dist.* v. *Morey*, 74 Fed. 2d 101 (C. C. A. 5); *City of Jacksonville* v. *Bankers Life Co.*, 90 Fed. 2d 141 (C. C. A. 7). While the right to bring a suit in equity under a special head of equity jurisdiction is not tested by the question whether there is an adequate remedy at law, and a plaintiff who has the right to sue under a special head may also have a right of action at law, the loss in the present case would be irreparable if the custodian diverted the funds to the extent provided by the subsequent statutes, since it would not be possible in practice to trace these funds among the creditors of the District, even if there was a right to do so, and the custodian himself may be unable to respond in damages. Mandamus in the state court, if available, would not be an adequate remedy, since not only do appellants pray for substantial negative relief, but the remedy, to be adequate, must be on the law side of the federal courts, *Henrietta Mills* v. *Rutherford*

County, 281 U. S. 121, and in the federal courts mandamus for this purpose is only available as an ancillary remedy after judgment has been recovered. *Rosenbaum v. Bauer*, 120 U. S. 450.

In their brief (p. 8) the Board contends that there is no proper allegation of a threat by the defendants to take action under the subsequent statutes which would be detrimental to the plaintiffs. This is a strange contention since not only is there an allegation of threat in the bill (R. 38-39) carried by reference into each of the supplemental bills (R. 55, 208-209) but it is the duty of the defendants, as provided in the subsequent statutes, which purport to repeal all parts of the prior bond contract statutes which are in conflict with the subsequent statutes, to prepare the tax lists, collect the taxes and distribute the taxes all in accordance with the provisions of the subsequent statutes unless these subsequent statutes are determined by a court to be unconstitutional. The subsequent statutes permit no discretion on the part of these defendants to take or not to take the action provided in the subsequent statutes, nor have these defendants the power to determine whether the subsequent statutes are valid or invalid. This is not a case where these defendants may or may not execute the subsequent statutes as they see fit. In the present case, the Board of Commissioners presented to the Legislature these subsequent statutes containing the provisions reducing and diverting the taxes, and relieving the Trustees from obligations imposed on them by the bond contract statutes, with recommendation that the legislature enact the statutes, which the legislature has done. Appropriate allegations to this effect have been made (R. 31, 56-57, 59, 212-213).

The strenuous opposition which these defendants have put forth in resisting in the courts the efforts of bond-

holders to have the taxes levied by the statutes under which the bonds were issued, collected and applied to the payment of the bonds is shown in the decisions of the Florida Supreme Court in *State ex rel. Sherrill and Van* v. *Milam*, 113 Fla. 491, 559, 587; 153 So. 100, 125, 136. Not only have these defendants urged that the subsequent statutes are valid while they were resisting the effort of bondholders to have the proper taxes collected and applied to the payment of the bonds, but, because of the efforts of the bondholders in this respect, the Board have threatened even to abandon the District. *State ex rel. Sherrill and Van* v. *Milam*, 113 Fla. 584-586. Such action was taken by the Board before the 1937 statute was enacted.

Such contention is now made by the Board notwithstanding its different attitude in the district court. In the petition for rehearing (par. 9, R. 265), appellants allege as follows:

> "(9) The Court in its judgment of August 2, 1938 overlooks the fact that at the oral argument of this case on March 3, 1938, Mr. Fred H. Kent, counsel for the defendant Board, admitted in open court that the 1937 Act is void in the particulars complained of as against bondholders, and explained that it was passed as part of the machinery for a proposed refunding of the indebtedness of the district."

The contention of appellees that the jurisdiction of the federal court is not properly alleged by plaintiff is unsound since one day after the bill was filed an amendment thereof was filed (R. 54-55) which specifically alleges that the jurisdiction is based on a federal question. This is sufficient. 28 U. S. C. A., Sec. 777; *Norton* v. *Larney*, 266 U. S. 511; *Smith* v. *McCullough*, 270 U. S. 456; *Mexican C. R. Co.* v. *Duthie*, 189 U. S. 76. In the present case, not only does the federal question appear from the allega-

tions of the bill, and has been specifically alleged as such in the amendment, but the decision of the district court on the former motion as shown by the court's opinion was based on the presence of the federal question which was the essential matter involved and decided. *Rorick* v. *Board of Commissioners*, 57 Fed. 2d 1048. If necessary an amendment to state that a federal question is involved would be permitted by this court. *Norton* v. *Larney*, 266 U. S. 511.

The Board and Trustees contend that there has been delay on the part of the plaintiffs in seeking relief in this case (Board's Brief, p. 5; Trustees' Brief, pp. 3, 32) notwithstanding that seldom has there been such a continuous enactment of destructive statutes such as those proposed, for the purpose of destroying the bonds, by the Board of Commissioners, whose duty it was to protect the bonds. The fact that the courts determined the two statutes of 1929 and 1931 to be invalid, did not in the least deter the Board including until 1931 the five principal state officers who are the Trustees of the Internal Improvement Fund, from presenting to the legislature and recommending the passage of still other statutes, including the statute of 1937 which to a far greater extent violated the rights of the appellants in the respects in which the court had just held the earlier statutes to be invalid. Resistance in every respect which the Board could conceive has been put forward in opposing the efforts of the bondholders to have the taxes entered on the tax rolls at the proper rates and collected and applied to the payment of the bonds, and in resisting efforts to have the destructive legislation held invalid. The amount of litigation is indicated by the cases cited in the briefs on this appeal. After more than seven years of such efforts by the Board, during which time the Board obviously has been engaged in trying to exhaust and

discourage the bondholders, the Board of Trustees now state in effect that one reason why this Court should support these efforts of the Board is that the plaintiffs have been guilty of delay.

The contention of the Board (Brief, p. 8) that the prayers for relief in the bill and supplemental bills are not sufficient is unsound. Relief is asked against the Board to enjoin the members thereof from executing and enforcing the subsequent statutes especially in respect of the reduction and diversion of the acreage taxes from the payment of the bonds (R. 42, 69, 224, 225, 226), and the destruction of the relation created by the statute under which the bonds were issued in respect of the obligation of the Trustees to pay taxes on the bid off lands. Relief is asked against the custodian of the taxes by seeking to enjoin him from executing and enforcing the subsequent statutes by diverting the taxes to purposes other than the payment of the bonds (R. 42, 68). Relief is asked against the tax assessors and the tax collectors to enjoin them from acting under the subsequent statutes (R. 224, 225). Relief is asked against the Trustees of the Internal Improvement Fund by seeking to enjoin them from executing the subsequent statutes by taking action to destroy their obligation to pay taxes on the bid off lands, and by transferring tax sales certificates back to the Board for the purpose of escaping such obligation, by receiving certificates of indebtedness from the Board on the theory that the taxes paid by the Trustees on the bid off lands were an indebtedness from the Board to the Trustees and the certificates of indebtedness are given to the Trustees by the Board in payment of such indebtedness, and by enjoining the Trustees from making adjustments and plans which would achieve the same purpose (R. 69-70, 73-74, 225).

The Board also seeks to have the court hold that any action it may have taken after the court's decision and in defiance of that decision should now be approved by the court on the ground that such action might result in inconvenience or hardship. Protection is not given by the court under such circumstances. *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1.

II. The appellants have a direct right of appeal to the Supreme Court of the United States under Sec. 266 of the Judicial Code.

Appellants have alleged that the subseqnent Everglades statutes of 1929, 1931 and 1937 violate the federal constitution; they have asked for interlocutory injunction and they have pressed the matter to hearing. The defendants are state officers and the state statute is of general application (*Ex Parte Collins*, 277 U. S. 565).

1. The Board of Commissioners as defendants are state officers within section 266 of the Judicial Code, and the state statutes attacked are of general application.

The lands within the District constitute a substantial part of the lands granted to the State of Florida by the United States under obligation by the State to drain and reclaim them. The State vested these lands in the Trustees of the Internal Improvement Fund, with duty to improve them, and the Trustees did make certain improvements therein; Everglades Drainage District was then created in order that the improvements might be made more rapidly out of the proceeds of bonds to be sold to the public. The improvements were to be made for the general health and welfare and would make these State lands suitable for cultivation and salable. The duty of the State

and of the Trustees in respect of these lands continued after this District was formed.

The Board of Commissioners designated by the Everglades statute of 1913 consisted of the same five principal state officers who have always been the Trustees of the Internal Improvement Fund, and they continued as the Board of Commissioners during all the time in which bonds of the District were being issued and improvements were being made out of the proceeds of the bonds and until the year 1931. The relation of the Trustees to the lands in the District continued not only through the fact that they were Trustees of all the swamp and overflowed lands of the state, and still owned, at the time the bill was filed, approximately 800,000 acres of land in the District, but, also, because the Everglades statute in existence during the time the bonds were issued, provided that the lands not purchased at tax sales for the amount of the defaulted taxes should be bid off for the Trustees, and these lands would thus revert to the Trustees.

The subsequent statutes not only reduced the taxes by seventy-five per cent. while the bonds were in default, but they diverted a substantial part of the reduced taxes to other purposes than the payment of the bonds. These subsequent statutes were presented to the legislature by the Board with recommendation that they be enacted. This Board was performing in part the function of the State of Florida in respect of these state lands, and in the performance of this function they determined what improvements should be made, where they should be made and when they should be made.

The state court has made clear the interest of the State in the lands in this District, the public nature of the District, and the State governmental functions which the

Board of Commissioners were under duty to perform. In *Arundel Corporation* v. *Griffin*, 89 Fla. 128, the court said:

> "The 'Board' created by the above quoted statute is an agency of the State and authority conferred upon the Board is exercised for the State and not for a subdivision of the State or for any private purpose or company."

In the same case, the court also stated:

> "The lands alleged to have been tortiously flooded are in a vast area of low lands known as swamp and overflowed lands * * * and the plaintiffs acquired and hold them with the knowledge that an extensive system of drainage operations is necessary to permanently reclaim the lands for settlement and cultivation, that such extensive operations are being conducted by the State through the agency of State officials under statutory authority. * * *"

In *Martin* v. *Dade Muck Land Co.*, 95 Fla. 530, the Court said:

> "The bond obligation is that of the district alone, though the drainage operations are by virtue of the statute conducted by State officials who under Chapter 610, Acts of 1855, are *ex officio* Trustees of the Internal Improvement Fund and who, under Chapter 6456, Acts of 1913, constitute the Board of Commissioners of the Everglades Drainage District. * * * (P. 572)
>
> The Everglades Drainage District is a statutory subdivision of the State for special governmental purposes. It embraces a large portion of each of several counties, and the administration of its governmental affairs is wholly distinct from the government of the several counties. * * * (P. 574)
>
> The obligation of the State to drain the granted lands was recognized in the enactment of Chapter 610,

approved January 6, 1855, which placed the lands in a separate fund to be called the Internal Improvement Fund of the State of Florida, and vested the lands in the Governor of the State and four other named State officials and their successors in office as Trustees of the Internal Improvement Fund of Florida, in trust for the purposes defined by the statute. Section 16 of the Act provides 'that the Trustees of the Internal Improvement Fund shall * * * make such arrangements for the drainage of the swamp or overflowed lands, as in their judgment may be most advantageous to the Internal Improvement Fund, and the settlement and cultivation of the lands.' Sec. 1070, Rev. Gen. Stats., 1920. In furtherance of the duty and purpose to comply with the granting Act of Congress requiring the lands to be drained, the State officers and their successors in office who are by Chapter 610, Trustees of the Internal Improvement Fund, with statutory powers and duties with reference to draining the swamp and overflowed lands, are by Chapter 6456, Acts of 1913 (succeeding Chapter 5377, Acts of 1905 and Chapter 5709, Acts of 1907), made the 'Board of Commissioners of Everglades Drainage District', with authority to establish and construct a system of canals, levees, dikes, draws, locks and reservoirs to reclaim the lands within the district. * * * (P. 580)

The Everglades drainage improvements are governmental and extensive, having reference to surface drainage, flood control, health, sanitary, transportation, land development and common betterment, and may extend to surface irrigation and perhaps other public improvements and enterprises designed to enhance the general welfare. * * * (P. 581)

The drainage of the Everglades is not a local undertaking initiated by interested parties merely to relieve the overflowed lands of surface water for the sole benefit of the lands to be drained; but the drainage being done in the Everglades Drainage District is by a State agency, under statutory authority. The

drainage removes surface water, reduces the level of subsurface percolating water and makes the lands all over the district more useful for high development. The public improvement is designed for the immediate and potential permanent general benefit to the entire statutory district containing millions of acres, by making the lands both public and private that are affected by surplus water, fit for improvement and development by growing thereon fruit, vegetable and staple crops, live stock and other products, by the erection of commercial, residential and other structures, by establishing business enterprises, transportation facilities, better flood control, sanitary, health and general welfare conditions, and by making the lands in the district that are not overflowed, more accessible from and over lands to be drained, and more valuable for all useful purposes. * * * *" (P. 584)

The Board of Commissioners consisted during all the time bonds of the District were being issued of the five principal State officers; by the 1929 statute the Board was increased to ten members, five of whom were the five principal State officers, the other five being landowners in the District, appointed by the Governor of the State; by the 1931 statute (sec. 2) the five landowners appointed by the Governor became the sole members of the Board of Commissioners and they were required to take the oath prescribed in the state constitution to be taken by state officers, as provided in the statute (sec. 3); this arrangement was continued by the 1937 statute (sec. 2). This Board was the agent of the State of Florida in respect of the 4,000,000 acres of land in this tax district for the express purpose of making the improvements in these lands in order to carry out the obligation of the State to the United States and for the purpose of making the lands suitable for settlement and cultivation, and in this respect they were performing a State function of great importance. The Ever-

glades Drainage District, comprising 4,000,000 acres of land in many counties in Florida all of which under the statute may revert to the State, is one of the most important areas in the entire State of Florida. The Board of Commissioners are State officers within the provisions of Section 266, in that they are commissioners carrying into effect the state statute in respect of this imporant property, a substantial part of which was and is now owned by the State of Florida and in respect of all of which the State has the special duty to drain and reclaim.

2. The State Treasurer is a state officer within the meaning of Section 266.

Plaintiffs seek to enjoin the State Treasurer as custodian of the acreage taxes from applying the proceeds of these taxes to any purpose except the payment of the bonds (R. 42, 68). The State Treasurer not only is custodian of these trust funds but he is one of the Trustees of the Internal Improvement Fund and was from the time the District was formed; until the 1931 statute was enacted he was a member of the Board of Commissioners and by that statute was retained as ex officio Treasurer of the District. He was made custodian because this District is a state project of great importance, and because it was intended by the legislature to assure the bondholders that the taxes levied for the payment of the bonds would be held as security for the bonds and applied to that purpose. This tended to make the bonds salable, and thus to make the funds of the bondholders available for the improvement of these State owned lands in this important project.

3. The Trustees are state officers within the meaning of Section 266 of the Judicial Code.

The first supplemental bill prays (par. 4, R. 64, as amended R. 69) that the Trustees be enjoined from trans-

ferring to the Board of Commissioners tax sales certificates in respect of bid off lands, that the Trustees be enjoined (par. 8, R. 66, as amended R. 71) from receiving certificates of indebtedness from the Board of Commissioners and from disposing of their property except in accordance with the bond contract statutes; and in the second supplemental bill it is prayed (par. 7, R. 225) that an injunction be granted against the Board and Trustees restraining them from entering into any agreements or making any settlement between them in the consummation of certain debt refunding and adjustment plans. The fourth prayer of the original bill (R. 42) is for an injunction restraining the Board from preparing and forwarding to the tax assessors tax lists unless such tax lists shall include all the lands of Everglades Drainage District on which taxes were imposed by the statutes under which the bonds were issued, and also include drainage taxes on all such lands at the rates provided in said statutes, applying to lands bid off for the Trustees as well as other lands in the District. There is a similar prayer in the second supplemental bill (par. 3, R. 224).

Everglades Drainage District v. *Florida Ranch & Dairy Corporation*, 74 Fed. (2d) 914, is distinguishable not only on the grounds set forth on pages 5 and 6 of our brief, that is, that there was in that case an adequate remedy at law and that the Trustees and State Treasurer were not parties, but also for the reason that the only statute concerning which the plaintiffs complained in that case was the statute of 1925 which levied the largest total amount of taxes levied by any of the statutes which authorized the issue of bonds of the District. As a bondholder whose bonds were issued under the 1923 statute, the plaintiff was complaining of a statute which increased the total amount

of the taxes levied for the payment of the bonds. As a landowner the plaintiff was complaining only that the taxes levied on his lands in the District by the 1925 statute were too high.

In our case we seek to restrain statutes of the State passed after the issue of the bonds which were presented to the legislature by State officers with recommendation that they be passed for the purpose of destroying the bonds issued by a State project to improve State lands which it was the duty and purpose of the State to improve.

The case of *McNee* v. *Wall*, 4 Fed. Supp. 496, rev'd 296 U. S. 547, is also distinguishable on this point since the District involved in that case was obviously a local district, for the purpose of creating an inlet at the St. Lucie Canal and the members of the Board were elected by the residents of that District as provided by the statute.

III. By the statutes under which the bonds are issued the Trustees are under obligation to pay taxes on the lands in the District bid off to them at tax sales.

(a) *The contention of the Trustees and the Board that the statute should not be interpreted to impose an obligation upon the Trustees to pay taxes on bid off lands is unsound.*

The principal argument of the appellees that there is no obligation upon the Trustees to pay the acreage taxes upon the lands bid off for the Trustees at the tax sales is based upon the meaning of the word "held" as used in the last paragraph of section 5 of the 1913 statute, the taxing section of the statute. In interpreting the meaning of the word "held", the Trustees make a distinction between the lands in the District held by them but not bid

off for them at tax sales, and those lands bid off for them at the tax sales (Trustees' Brief, p. 3). They state that the only question discussed in their brief is the liability of the Trustees for the payment of delinquent taxes on lands in the District which had been bid off for them, and they admit that the Trustees are liable for the taxes on the lands in the District held by them but not bid off for them (Trustees' Brief, p. 3). The argument of the Trustees in respect of the meaning of the word "held" in section 5 is (Trustees' Brief, p. 12) that this word has reference only to lands owned by the State of Florida and held by the Trustees as State agents, since the section originally enacted in 1913 is to be construed with reference to the circumstances then existing and the statutes then in force, and that upon that theory the section of the statute cannot be construed to apply to lands held by the Trustees bid off for them for the reason that no such statute existed in 1913 and did not exist until passed by the legislature of 1917.

The word "held" in the last paragraph of section 5 is used in respect of lands of the Trustees on which acreage taxes shall be paid by them. These taxes are imposed by the statute enacted in a given year but the taxes are levied and imposed for that year and for specified years in the future. The lands on which taxes are levied for a given year, the year 1939 for example, are the lands which are held on the date in that year when the tax lien becomes effective. The lands which are taxable, whether of the Trustees or of other holders, for the year 1939, are not the lands held by them in the year 1913 when the Everglades Statute was originally enacted but those lands held by them in the year 1939. The reason that the Trustees are required to pay the taxes for the year 1939 on the lands held by them in the year 1913 and also in the year 1939, is not

because the Trustees held the lands in the year 1913 but because they hold them in the year 1939.

As the statute was amended from time to time to authorize the issue of additional bonds, each amendment imposed additional taxes upon all the lands in the District, and these additional taxes applied to the lands in the District on the tax date in each year specified in the amendment. The obligation of the Trustees under such amendment of the statute was to pay the taxes on the lands held by them on such dates regardless of the manner in which they acquired the lands or the nature of the lands which they held in 1913. Such amendments imposing additional taxes were made after section 12 of the original statute of 1913 had been amended in 1917 by providing for the bidding off of the lands for the Trustees. Even in respect of the lands of the Trustees not bid off for them, the additional taxes imposed by the amendment would apply to the lands held by them when the amendment became effective, and not to the lands held by them in the year 1913. If the Trustees for a period after 1913 held no lands in the District whatever and later acquired lands in the District, the lands so acquired would be subject to the tax and the Trustees would be required to pay the taxes thereon regardless of whether the lands were acquired by the Trustees by being bid off for them or in any other manner. The Trustees' contention as to the meaning of the word "held" would release them from the payment of taxes on lands acquired after 1913 in any manner whatever. We urge that the word "held" applies to all lands held by the Trustees on the tax day, whether held in 1913 or acquired thereafter, and whether acquired through bidding off at tax sales or by purchase or in any other manner.

(b) *The statute, when construed to impose upon the Trustees the obligation to pay the acreage taxes on the bid off lands, does not violate the Florida Constitution because of defect in the title to the statute.*

The Trustees in their brief (p. 29) contend that the title to Chapter 7305 does not indicate an intention to require the Trustees to pay taxes on bid off lands, and if the act is construed so to do, it would be unconstitutional as in violation of Sec. 16 of Article 3 of the Florida Constitution, which provides:

> "Each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be amended or revised by reference to its title only; but in such case the act, as revised, or section, as amended, shall be reenacted and published at length."

The provisions of Chapter 7305, Laws of 1917, were embodied in the Revised General Statutes of Florida; for example, section 12 requiring the bidding off of tax delinquent lands for the Trustees became section 1171 R. G. S. The bonds in controversy are those issued at various times between July 1, 1920 and July 1, 1925 (Trustees' Brief, p. 5). Sec. 6 of Chapter 7838, Laws of 1919, made the Revised General Statutes effective on the 30th day after the date of the Governor's proclamation announcing their publication. On January 7, 1921, the Governor published his proclamation announcing that the Revised General Statutes would become effective on the 6th day of February, 1921.

The Supreme Court of Florida has held that defects in the title of acts which are embodied in a revision are of no moment. *Carlton* v. *State*, 63 Fla. 1, *Christopher* v. *Mungen*, 61 Fla. 513, 55 So. 273, *McConville* v. *Ft. Pierce*

Bank & Trust Co., 101 Fla. 727. In the *Carlton* case the court said (p. 8):

> "It is first contended that the original act of 1901 of which this section is a part, is unconstitutional because its title was not broad enough. This is now of no moment as the act is brought forward and reenacted in several sections of the General Statutes of 1906."

In the *McConville* case the court said (p. 730):

> "As section 13 of Chapter 6426, Acts of 1913, became by revision, section 4167 Revised General Statutes of Florida, 1920, it is clear that under the rule in such cases any defect in the original title was cured by such revision."

But the title to Chapter 7305 was sufficient even before that amendment was embodied in the Revised General Statutes of Florida of 1920. The title of Chapter 6456 of 1913, the original Everglades statute, which contains no specific reference to the Trustees or to the payment of taxes by them, has not been questioned by these defendants as insufficient, although the 1913 statute imposed upon the Trustees the duty to pay taxes on lands in the District held by them and in fact the Trustees in their brief (p. 3) admit they are liable for the taxes on the lands which they own in the District, as agents of the State; the title of the 1917 statute in a similar manner, states that it is an "Act to Amend Section 9 of Chapter 6456 * * * Relating to the Creation of Everglades Drainage District of the State of Florida, Defining Its Boundaries and Prescribing Its Powers and Authorizing the Levy and Collection of Taxes and Assessments Upon the Lands in Said District for the Purpose of Draining and Reclaiming the Said Lands and Carrying Into Effect the Provisions of Said Act." In *Lainhart* v. *Catts*, 73 Fla. 735 the Florida

Supreme Court, considering the title of Chapter 6456 of 1913 said:

> "The title of the Act sufficiently expresses its subject, certainly enough so as to give reasonable notice of the matters dealt with by the Act and as to its purpose and scope. The title need not be an index to the Act, it being sufficient if it may reasonably lead to inquiry as to its contents."

In *Martin* v. *Dade Muck Land Co.*, 95 Fla. 530, it was urged that the title to Chapter 12016, Laws of Florida, 1927, was insufficient under Article 3, Sec. 16, of the State Constitution. The title was as follows:

> "An Act to Authorize the Issuance of Additional Bonds of the Everglades Drainage District of Florida, and to provide for the Payment of Such Bonds."

One express provision of the Act was construed to provide that the Trustees of the Internal Improvement Fund were required to pay the acreage taxes upon lands in the District bid off for them at tax sales. The court in holding that the title to the Act was sufficient said (pp. 573-4):

> "Other provisions of the Act that are specifically asserted to be invalid, appear to be properly connected with the one general subject that is briefly expressed in the title of the Act; * * *. The title of the Act is sufficient to express a single subject and is not in any way misleading as to its valid provisions."

(c) *This court should not follow the decision of the Supreme Court of Florida in State ex rel., Board of Commissioners* v. *Sholtz,* 112 Fla. 756.

The Board as the sole relators did not, and could not, present the matter involved properly to the State court

in the *Sholtz* case. To show that this is true, we consider one only of the important considerations which should have been presented to the court in that case.

The Trustees in their brief (p. 19), state in respect of the practical interpretation made by the Board and by the Trustees through the payment by the Trustees of the taxes on the bid off lands that, while it is well settled that a departmental construction of an Act is a guide to the court in its construction, it is not conclusive on the court, and should not be followed when the public benefit or right is involved and when the construction itself is manifestly incorrect. They also state (p. 19) that the erroneous construction by the then Trustees is not a part of the bond contract and no rights of appellants have been violated by the Trustees refusing "to longer follow this erroneous and manifestly incorrect construction". The Trustees do not question the qualifications or good faith of their predecessors in making this practical construction over a period of years while bonds of the District were being sold, nor do they deny that in administering this statute it was necessary to make such a practical construction or that the Trustees represented to the bond purchasers that the Trustees' practical construction was the correct construction.

Since it is admitted by the Board and by the Trustees that the practical construction is a guide to the court, and since that construction was made by the five principal officers of the State acting in the same capacity in which the Trustees and the present Board are acting, it necessarily follows that the court in the *Sholtz* case should have had the benefit of this guide in making its construction of the statute. This raises the question whether the state court in the *Sholtz* case did receive such assistance, since no reference whatever is made in the opinion of the court

in the *Sholtz* case to the practical construction of the statute made by the Trustees and the Board in the payment by the Trustees of acreage taxes on the bid off lands during a period of years.

In determining whether the court in the *Sholtz* case had a reasonable and proper opportunity to construe the statute, it is important to inquire what position the Board took in that case in reference to this matter of practical construction. The members of the Board, who were the sole relators in the *Sholtz* case, were appointed by the Governor of the State, who was one of the Trustees and a respondent in that case. On this appeal, the Board rely upon the Trustees to state the position of the Board in respect of the interpretation of the statute (Board's Brief, pp. 2, 10), as to the obligation of the Trustees in respect of lands bid off for them. On the question of the liability of the Trustees to pay taxes on the bid off lands, the interests and purposes of the Trustees and of the Board and the interpretation made by them of the bid off provision in the statute were always the same.

In their briefs in this court neither the Trustees nor the Board purport to state what position they took before the state court, or whether any brief was filed by the Board, and if so what position the Board took therein especially in respect of the practical construction of the statute by the Trustees and the Board. The position of the Board is doubly difficult because the Board presented and recommended to the legislature in 1931 the bill containing the provision for bidding off the lands at tax sales for the Board, instead of for the Trustees as required by the bond contract statutes. In taking such action the Board obviously was seeking to promote the interests of the Trustees. In presenting such a bill to the legislature for the purpose

of reducing the taxes and diverting their proceeds, as well as changing the arrangement for bidding off for the Trustees, the Board were also seeking to weaken if not to destroy the bonds of the District. It would be impossible for the present Board and Trustees to convince this court that the Board as relator in the *Sholtz* case held the view that the practical construction was a vital matter in construing the statute, that they then so regarded it, that they were not more interested in assisting the Trustees to evade their obligations than in enforcing the statutes upon which the bondholders relied, or that they presented to the state court all the considerations bearing on the interpretation of the statute in good faith and to the best of their ability. Anything less done by the Board makes the judgment in the state court a mere form.

In their brief in this court the Trustees state (p. 11) that the records in the *Sholtz* case show that Messrs. Watson & Pasco & Brown, as counsel for appellants, filed a brief in that case as *amicus curiae* urging the same contentions urged on this appeal by appellants. In the reported case the names of the attorneys who appeared for relator and for respondents are given, but there is no reference whatever to any attorney appearing or having been permitted to appear as *amicus curiae*, or of any brief having been filed *amicus curiae;* nor is there any reference whatever in the opinion to the practical construction of the statute made by the Board and the Trustees. It would be strange indeed if the court in the *Sholtz* case while making no reference whatever to the practical construction of the statute had considered a brief containing a discussion on that point. Since the Trustees have stated that there was filed in the *Sholtz* case a brief *amicus curiae* urging the same contentions presented on this appeal by

appellants, we annex as "Exhibit A" to this reply brief the only paper forwarded to the court in that case by Watson & Pasco & Brown from which it will appear that Watson & Pasco & Brown merely endeavored to indicate to the court why the court should not determine in that proceeding the questions which were there involved.

In our main brief we have set forth cases showing that this court in a suit involving impairment of the obligation of a contract will make its own determination as to whether there is a contract, what its obligation is and when it has been impaired (Brief, p. 84), and that this Court will not be bound by a decision, where, as in the *Sholtz* case, the relator could not and did not properly present to the Court a real controversy.

(d) *An obligation of the Trustees to pay the taxes on the lands bid off for them at tax sales is not a violation of the State Constitution prohibiting the issue of bonds by the State or the lending of its credit.*

The Trustees contend that if the Everglades statute, Chapter 6456, Laws of Florida of 1913, sec. 12, as amended in 1917 by Chapter 7305, is construed to impose an obligation upon the Trustees to pay the acreage taxes upon the lands bid off to them at tax sales, the statute as so construed will violate the State Constitution, Secs. 6 and 10, Article 9, prohibiting the issue of State bonds or the lending of State credit, notwithstanding the decisions of the state court in *Trustees* v. *Bailey*, 10 Fla. 112, and *Martin* v. *Dade Muck Land Co.*, 95 Fla. 530. In the *Bailey* case the court held that the pledging of the assets of the Trustees, among other things, to pay interest on bonds issued by railroads under the provisions of the statute creating the Trustees of the Internal Improvement Fund (Chapter 610

of 1855), did not violate the State Constitution, Sec. 11, Article 13, prohibiting the pledging of the faith and credit of the State. The court said:

> "It is very clear that the general assembly could not issue what are known as 'faith bonds' in the banking history of this country, thereby pledging the faith and credit of the state to raise funds in aid of any corporation, but we think it equally clear that the general assembly may convey in trust, pledge or mortgage, for the benefit of those who may aid in the construction of certain internal improvements, a fund already existing and possessed by the state through the cession of the United States, * * *."

For the present purpose we think that the distinction which the Trustees purport to make between the provision contained in the State Constitution when the *Bailey* case was decided and the provisions now contained in the State Constitution is without substance.

In any event, the same provisions were contained in the State Constitution when *Martin* v. *Dade Muck Land Co.* was decided as are now contained in the constitution. In the *Dade Muck Land* case there was directly involved the question whether a 1927 statute, imposing upon the Trustees the duty to pay drainage taxes on lands bid off for them by the tax collectors under that statute, violated sections 6 and 10 of Article 9 of the State Constitution, and it was held that these sections were not violated by that statute as construed by the Florida Supreme Court. The Trustees in their brief (pp. 18 and 29) have not distinguished *Martin* v. *Dade Muck Land Co.;* they refer to the fact that the 1927 Act was later repealed, and also to the fact that the court in that case considered what assets would be available for the payment of such taxes; but these matters have no bearing upon the decision by the court

that the statute in the respect here considered did not violate the State Constitution.

We do not understand that the Trustees contend that every obligation incurred by the Trustees of every kind violates Sections 9 and 10 of the State Constitution. The Trustees, before the formation of the Everglades Drainage District, made contracts for the construction of improvements in Everglades Drainage District. *Trustees v. Root*, 63 Fla. 666. The Trustees, in their brief (p. 3), admit that they are liable for the taxes on the lands which they own in the Everglades Drainage District; there is no contention that such obligation violates the State Constitution. Under the *Dade Muck Land* decision, the Trustees were liable for the taxes on the bid off lands under the provisions of the 1927 statute. So far as the provisions of the State Constitution are concerned, there is no difference between the obligation of the Trustees to pay the taxes on the lands in Everglades Drainage District which they owned at the time of the formation of the District and their obligation to pay taxes on the bid off lands. The Everglades statute vests the title of the bid off lands in the Trustees after the two-year period of redemption has expired. The Trustees do not purport to show any basis on which the Trustees would be liable for other obligations without violating the State Constitution but could not be liable for the taxes on the bid off lands, and they are confronted with the decisions in the *Bailey* case and in the *Dade Muck Land* case which remove the possibility of such a distinction.

(e) *A suit against the Trustees is not a suit against the State.*

The Trustees contend that a suit against them is a suit against the State in violation of the 11th Amendment of

the Constitution of the United States. Although the Trustees have been parties defendant in numerous cases since the enactment of the statute creating the Trustees of the Internal Improvement Fund in 1855, the appellees have not cited a single case in which it has been held that a suit against the Trustees is a suit against the State. In *Trustees* v. *Bailey*, 10 Fla. 112, decided in 1862, it was held that a suit against the Trustees was not a suit against the State, the court saying (p. 132):

> "The only question remaining is whether the Complainant has a right to the remedy by injunction prayed for against the Trustees. It has been argued that he has not, because the Trustees represent the State, which cannot be sued. It is true the State cannot be sued, but where the State appoints an Agent or Trustee to pay a particular debt, or class of debts, with a specific fund, it has never yet and never can be held that the party interested in the fund may not intervene by injunction to prevent such agent from appropriating the fund to an entirely different purpose. Such is the case here."

In *Wilson* v. *Mitchell*, 43 Fla. 107, the court said:

> "The bondholder had the right to compel the trustees to discharge any duty under the statute designed for his benefit by appropriate legal proceedings, and to enjoin them from misappropriating funds to which the bondholder was entitled to look for his payment: * * *."

In *Trustees* v. *Gleason*, 15 Fla. 384, and in *Trustees* v. *Root*, 59 Fla. 648, a demurrer by the Trustees to the complaint was overruled.

In the Everglades statute (Sec. 23, R. G. S. Sec. 1182) it is provided that any bondholder may sue any of the officers or persons mentioned in the Everglades statute in relation to "the said bonds, or to the collection, enforce-

ient and application of the taxes for the payment thereof: Provided, however, that no obligations authorized by this Article shall be construed as an obligation of this State, but only as an obligation of the drainage district herein created". Section 1055 R. G. S. also provides that the obligation of the Trustees may be enforced.

This matter is covered fully in our main brief (pp. 86-87).

The decree of the district court is erroneous and should be reversed.

Dated March, 1939.

Respectfully submitted,

WILLIAM ROBERTS,
W. H. WATSON,
SAMUEL PASCO,
Counsel for Appellants.

EXHIBIT A.

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

STATE EX REL. BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT,

vs.

DAVID SHOLTZ, GOVERNOR, J. M. LEE, COMPTROLLER, CARY D. LANDIS, ATTORNEY GENERAL, W. V. KNOTT, TREASURER, AND NATHAN MAYO, COMMISSIONER OF AGRICULTURE, AS AND CONSTITUTING THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA.

Now come W. H. Watson, Samuel Pasco and Clarence J. Brown, as *amici curiae,* and suggest and show to the Court:

1. That there is no real controversy between the relator and the respondents, who are hereafter to be referred to as the board and the trustees. This appears from:

(a) The alternative writ of mandamus, which alleges in paragraph 6 thereof the transfer to the board by the trustees on September 18, 1931, pursuant to the provisions of Section 65 of Chapter 14717 of the Acts of 1931, of the tax certificates theretofore issued to the trustees, save those retained by the trustees under the provisions of the said Act; and by paragraph 9 of said writ showing the pendency in the federal court of suit begun May 19, 1931 by bondholders, to prevent

such transfer and to have the said trustees held to be required to pay for tax certificates and to purchase property offered at tax sales and not bid in by others.

(b) The opinion of the court in *Rorick, et al.* vs. *Board of Commissioners, et al.*, 57 Fed. 2d 1048, showing the questions involved in that litigation and the challenge by the board and the trustees by motion to dismiss of the contention of the bill that Section 65 of Chapter 14717 of the Acts of 1931 was void as to bondholders.

(c) The answer of the board in the suit in the federal court mentioned in paragraph 9 of the alternative writ, a copy of which answer is hereto attached and made a part hereof, by which answer it asserts the validity of Section 65 of Chapter 14717 as against bondholders, and that the trustees are not required to pay for tax certificates, but took and held the same as trustees for Everglades Drainage District.

(d) The fact, appearing from published notices of application for the legislation which became Chapter 14717, Acts of 1931, made by W. I. Evans, Esquire, as attorney of the board, and the proof of publication of Senate Bill 332 (which became Chapter 14717) made by the said W. I. Evans, Esquire, and attached to said bill upon its introduction in the State Legislature, that the said Board proposed said legislation, evidently prepared by its said attorney, and procured its passage.

(e) The character of the argument submitted by the relators in this cause.

Under such circumstances the suit should be dismissed, for when it is apparent that the object of a suit is to obtain

a decision that would affect third persons who are litigating the same question in another court, the suit should be dismissed. Any attorney is competent to call the matter to the attention of the court.

Ward vs. *Alsup* (Tenn.), 46 S. W. 574, 575.
Lord vs. *Veazie*, 8 How. 251, 12 L. E. 1067.

2. It appears from the allegations of paragraph 9 of the alternative writ that there is pending in the United States District Court for the Northern District of Florida a suit by bondholders against the board and the trustees involving the precise questions presented by the alternative writ, and the motion of the trustees to quash, and that such court has taken jurisdiction of said suit and has decided the precise question by an opinion, unreversed, which is hereby referred to and adopted as a part hereof as the same appears at page 1048, *et seq.*, of 57 Fed. Rep. 2d Series.

The federal court being the first to take jurisdiction that jurisdiction is exclusive and cannot be entrenched upon or impaired by any other court. Both the board and the trustees are parties to the litigation in the federal court and it is not competent for them to defeat or impair the federal jurisdiction by proceedings in the state court involving the same legal questions.

Prout vs. *Star*, 188 U. S. 537, 544-5; 47 L. E. 584, 587.

Ex parte Young, 209 U. S. 123, 161; 52 L. E. 714, 729-30.

Rickey Land & Cattle Co. vs. *Miller & Lux*, 218 U. S. 258, 54 L. E. 1032.

Astiazaran vs. *Santa Rita etc. Co.*, 148 U. S. 80, 37 L. E. 374.

See also:

Mercantile Trust Co. vs. *Roanoke etc. R. Co.*, 109 Fed. 3, 9.

Sharon vs. *Sharon* (Calif.), 23 Pac. 1100, 1101.

Adams vs. *Mercantile Trust Company* (C. C. A. 5), 66 Fed. 621.

Detroit R. Co. vs. *Interstate Commerce Commission* (App. D. C.), 277 Fed. 537.

Wade vs. *Clower* (Fla.), 114 So. 548.

In the language of the Supreme Court of the United States:

"It was unnecessary, unwarranted in law and grossly disrespectful to the Circuit Court to invoke the interposition of the state court as to anything within the scope of the litigation already pending in the federal court."

New Orleans vs. *New York SS Co.*, 20 Wall. 387, 393, 22 L. E. 354, 357.

Moreover, it appearing that the precise question has been decided in the pending federal suit (preliminary it is true) to which both the board and the trustees were parties, that decision becomes the law to them, binding on both alike until modified or reversed.

In re Smith Estate (Mont.), 199 Pac. 696, 704.

Southern Pacific R. R. Co. vs. *U. S.*, 168 U. S. 1, 42 L. E. 355.

This seems to follow because in the federal suit and in conformity to the opinion therein referred to, the motions of the board and the trustees to dismiss the bill were overruled, as appears from a copy of the order hereto attached.

It follows, therefore, that to prevent conflict with federal court, which is unseemly, this court should de to proceed to any examination of the questions pres or if it proceed at all should proceed in conformity to law as declared by the federal court in the suit there pe ing, to which both the board and the trustees were part At any rate, if this court will not proceed in conform to the opinion of the federal court, it will for the pre suspend proceedings in this mandamus suit until the in the federal court is tried and determined.

Wade vs. *Clower*, Fla. , 114 So. 548.

Respectfully submitted,

W. H. WATSON,
SAMUEL PASCO,
CLARENCE J. BROWN.

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